DOCUMENT RESUME

ED 224 028 CS 207 270

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TITLE The Public/Private Figure Status of Corporate and Executive Libel Plaintiffs after "Gertz."
PUB DATE Jul 82
NOTE 37p.; Paper presented at the Annual Meeting of the Association for Education in Journalism (65th, Athens, OH, July 25-28, 1982).
PUB TYPE Reports - Research/Technical (143) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Business; *Court Doctrine; *Court Litigation; Freedom of Speech; *Journalism; Media Research; *News Media
IDENTIFIERS Business News; *Gertz v Robert Welch Inc; *Libel

ABSTRACT

Since 1974, when the Supreme Court concluded in "Gertz v. Robert Welch, Inc." that public figures and private figures deserve different treatment under libel law (with private figures needing a lower standard of proof), most lower courts have had to sort out the two categories. From the results in "Gertz" and other cases, three questions have emerged that seem crucial in drawing the public/private line: (1) Is there controversy at all, and is it truly "public" and not just newsworthy? (2) Has the plaintiff voluntarily done something to inject himself or herself into the controversy? and (3) Did the plaintiff enter the controversy in an effort to influence the outcome? In 17 cases since "Gertz," nearly two-thirds of the corporations have been adjudged private figures, and two-thirds of these have won favorable decisions. Answering each of the three questions has been difficult for the courts, and the answers given are not entirely consistent. Unlike corporate plaintiffs, business people suing the media since "Gertz" were found to be public figures in 7 out of 13 cases. At the same time, those judged private figures were more successful. Answering the three questions for business people seems even more difficult and messy than for corporate plaintiffs. Still, when taken together, more than half of both business people and corporate plaintiffs have been found to be private figures, a result that may not bode well for the press. To protect themselves, journalists must carefully consider the courts' criteria, but at the same time, they should not allow fear of libel to stifle their business reporting. (JL)

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THE PUBLIC/PRIVATE FIGURE STATUS OF CORPORATE AND EXECUTIVE LIBEL PLAINTIFFS AFTER GERTZ

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Since 1974, when the U.S. Supreme Court concluded that public figures and private figures deserve different treatment under libel law, most lower courts have had to sort out the two categories.[1] The task has been neither easy nor predictable. "Defining public figures," one judge has written, "is much like trying to nail a jellyfish to the wall."[2] Yet the decision is vitally important. It can mean the difference in the outcome of a case since private figure plaintiffs generally need to show less fault than public figure plaintiffs to win their cases.[3]

This paper examines the public/private dichotomy since Gertz v. Robert Welch, Inc.[4] in the context of corporate and business/executive libel plaintiffs in suits against the media.

Franklin's studies of defamation litigation illustrate the significance of these plaintiffs. One study indicated that nearly half of the allegedly defamatory statements in appellate cases involved business crime or serious moral failing in business.[5] The same study found that "plaintiffs charged with moral failings related to business were very successful."[6] In a second study, Franklin found that a third of all libel plaintiffs in a four-year period could be categorized as

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manufacturing or business owners and managers, business corporations or nonprofit corporations.[7] Meanwhile, the news media maintain an active interest in economic, business and consumer reporting, and, in fact, have been criticized for not doing more.[8]

This paper first briefly discusses basic principles of libel law involving corporations and business owners and executives.[9] It then traces the development of the public/private figure distinction beginning with Gertz. Cases since Gertz in which the public/private status of corporate and executive plaintiffs has been addressed are examined, and implications for the press and business are considered.

Libel of Corporations and Businessmen

Corporations may sue for defamation affecting their business, property or credit -- that is, for defamatory statements affecting their prestige and standing in business.[10] Corporations are not considered to have reputations in any personal sense. Therefore, they cannot be defamed by some words that would be actionable if published about the purely personal reputation of a natural person.[11]

A related question is whether corporations, because they lack purely personal reputations, should under any circumstances be treated the same as natural-person libel plaintiffs. After Curtis Publishing Co. v. Butts[12] and until Gertz, corporate libel plaintiffs were often required to prove "actual malice" -- i.e., reckless disregard for the truth or publication of a known falsehood[13] -- because they were involved in matters held to be of public concern.[14]

Gertz refocused attention on the public/private status of the plaintiff rather than on the public's interest in the issue over which

the defamation arose. In so doing, the court explicitly backed away from Rosenbloom v. Metromedia,[15] in which a badly divided court had extended the New York Times v. Sullivan "actual malice" standard[16] to all libel cases arising out of discussion of matters of public or general concern.[17] Under Rosenbloom, the public or private status of the plaintiff was irrelevant. But in Gertz, after analyzing the reasoning of Rosenbloom, the court concluded that, although the "actual malice" standard is justifiably applied to public officials and public figures, "the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them."[18] Consequently, the court held, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[19] In other words, private figure libel plaintiffs need no longer prove "actual malice."

But Gertz was a natural person -- an attorney -- and the Supreme Court has not subsequently ruled on any libel case involving a corporate plaintiff.[20] Was the public/private distinction in Gertz intended to apply to corporate plaintiffs?

At least one court has argued "no." Libel of a corporation does not involve the "essential dignity and worth of every human being," said the court in Martin Marietta Corp. v. Evening Star Newspaper Co., and, consequently, corporate libel is not a "basic of our constitutional system."[21] Since a corporation "never has a private life to lose," the court reasoned, it makes no sense to apply the Gertz public/private

distinction.[22] But Martin Marietta appears not to have been persuasive. A district court in Trans World Accounts, Inc. v. Associated Press[23] specifically disagreed with Martin Marietta's reasoning on the applicability of Gertz to corporate plaintiffs. Gertz embraced the public/private distinction without qualification, the court concluded, and there is no difference between the protectible reputational interests of corporations and those of individuals.[24] And as a practical matter, the natural person/corporation line is often fuzzy.[25] Other courts have preferred the reasoning of Trans World to that of Martin Marietta,[26] but more often, the corporation/natural person distinction has not been directly addressed. Rather, courts have impliedly refused to make the distinction and proceeded to categorize corporate plaintiffs as either public figures or private persons.[27]

When the plaintiff is a business owner or executive, the corporation/natural person distinction is irrelevant. An owner or executive may sue for defamatory statements that prejudice him in his business, occupation, employment or office.[28] But statements defamatory of one's business or corporation itself are not inherently defamatory of the individual, nor are defamatory statements about the individual inherently defamatory of the business or corporation "unless the words are such, in the light of the connection between them, as to defame both."[29]

Evolution of Public/Private Figure Doctrine Since Gertz

In Gertz, the Supreme Court concluded that private persons deserve more reputational protection than public figures and public officials because the latter have generally voluntarily and knowingly exposed

themselves to closer public scrutiny and because they can more easily help themselves when verbally attacked.[30] The court suggested broad guidelines for distinguishing public figures from private persons, and divided public figures into three categories: all-purpose, involuntary and voluntary limited-purpose [hereinafter "limited-purpose"].[31]

According to the court, all-purpose public figures occupy positions of "persuasive power and influence"[32] and achieve "pervasive fame or notoriety."[33] Involuntary public figures are hardly defined at all. The court said only that hypothetically a person might become a public figure "through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare."[34] Limited-purpose public figures, on the other hand, "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[35] When a plaintiff is arguably a limited-purpose public figure, the courts must look to "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation" to see whether he "thrust himself into the vortex of this public issue" or engaged "the public's attention in an attempt to influence its outcome."[36]

The court has followed up in three subsequent cases. In Time, Inc. v. Firestone, it found a prominent socialite who was involved in a divorce and who held press conferences to discuss the divorce case to be a private person.[37] The court focused on the nature of the controversy (the divorce), the voluntariness of the plaintiff's involvement in it, and the degree to which the plaintiff attempted to influence its outcome. The court distinguished "public controversies" from "all controversies of interest to the public," and found that Mary Alice Firestone's divorce

was "not the sort of 'public controversy' referred to in Gertz."[38] Then the court concluded that, although the divorce may have become public when the Firestones went to court, they were compelled to go to court by the state to seek the relief they wanted.[39] Finally, even though Mrs. Firestone held press conferences to discuss the divorce case, the court found that she was merely accommodating reporters' desire for information, not trying to influence the outcome of the case.[40] In other words, there was no "public" controversy, nor did the plaintiff voluntarily inject herself into a controversy nor did she attempt to influence a controversy's outcome.

Three years later, the court held two more libel plaintiffs to be private persons. The plaintiff in Hutchinson v. Proxmire was a scientist conducting research funded by the U.S. government.[41] The plaintiff in Wolston v. Reader's Digest was a man who, in the late 1950s, was held in contempt for failing to obey a subpoena from a grand jury investigating Soviet espionage.[42]

In Hutchinson, the court was unable to identify any specific public controversy other than a general concern about public expenditures.[43] Nor was Hutchinson's application for and acceptance of federal research funding the equivalent of thrusting himself into a controversy, much less attempting to influence its outcome.[44] Further, the court noted, whatever controversy there was came about as a result of the defamatory statements themselves -- in this case, a senator's "Golden Fleece Award."[45] And whatever access Hutchinson had to the media to defend himself came after the defamation and was limited to replying to it.[46] Such access, the court noted, is not "the regular and continuing access to the media that is one of the accouterments of having become a public figure."[47]

In Wolston, the court reiterated that being newsworthy and being a public figure are not the same. Given that a grand jury investigation of Soviet espionage may have been a public controversy, the court nevertheless concluded that Wolston's refusal to honor a subpoena -- apparently because of poor health -- was not voluntary injection into the controversy and certainly not an attempt to influence the outcome of any issue.[48]

Taken together, Gertz, Firestone, Hutchinson and Wolston suggest that at least three questions are crucial in drawing the public/private line: Is there a controversy at all and, if so, is it truly a "public controversy," not just a newsworthy one? Has the plaintiff voluntarily done anything at all to inject himself into the controversy? Did the plaintiff purposely enter the controversy in an effort to influence its outcome? If the answer to any of these questions is "no," it is likely that the plaintiff is not a limited-purpose public figure.[49]

Further, it seems clear that the controversy cannot have been created by the media via the defamation itself, but ought to have preceded the defamation. And, although the degree of a plaintiff's access to the media is apparently an important factor, such access must be broader and more pervasive than merely the access generated by the defamation itself.

The Public/Private Status of Corporations

An examination of 17 cases since Gertz in which corporate plaintiffs have sued the media for libel and in which the public/private distinction has been addressed reveals that nearly two-thirds of the corporations have been adjudged private figures.[50] Perhaps more

importantly, nearly two-thirds of the private-figure corporations have won favorable court rulings of one type or another.[51] Among these favorable rulings are reversals of summary judgment for defendants and denial of summary judgment for defendants.

The correlation between plaintiffs' success and decisions finding them to be private figures is even more striking if we consider the cases in which the corporations lost despite being found to be private figures. In one appeal, the case was remanded because the trial court had not actually applied Gertz. A jury had awarded the plaintiff damages.[52] In another, the defendant prevailed because there had been no direct libel of the firm.[53] And in a third, the corporate plaintiff was unable to show even negligence by the defendant.[54]

Closer examination of the cases indicates, not surprisingly, that the lower courts have focused consistently on the factors suggested by the U.S. Supreme Court when distinguishing public from private figures.

Public Controversy?

In some respects, whether or not the defamation involves a public controversy may be the most slippery question of all. The corporate-plaintiff cases appear to be consistent in suggesting that the news media cannot single-handedly create a public controversy.[55] But the plaintiff may not have created the controversy either; a third party may be responsible.[56] The cases further suggest that separating public controversies from matters that are merely newsworthy can be tricky and unpredictable.[57] Even the word "controversy" may elude easy definition.

For example, in Rancho La Costa v. Superior Court, an article accusing a resort of being a headquarters for organized crime was held

not to involve a public controversy because there is no public controversy over the desirability of organized crime.[58] Likewise, a federal appeals court in Bruno & Stillman, Inc. v. Globe Newspaper concluded that "the mere selling of products itself cannot easily be deemed a public controversy."[59] A state court in Vegod Corp. v. American Broadcasting Cos. agreed, adding that the availability and quality of goods are matters of public interest, but that does not mean they are a public controversy.[60] And a federal district court in General Products v. Meredith found that an article implying that a chimney manufacturer's products were hazardous did not involve a public controversy because there was no public controversy surrounding that type of chimney.[61]

On the other hand, a meat seller was found to be a public figure at least in part because through an advertising blitz, it "invited public attention, comment, and criticism."[62] And two insurance companies were held to be public figures in part because of the "public interest" in such companies and because insurance companies are closely regulated by government.[63] In another case, a debt collection company was found to become a limited public figure when the Federal Trade Commission issued a complaint against it -- a matter, the court said, of great interest to the public.[64] These decisions muddy the public interest/public controversy distinction. Perhaps the issuance of an FTC complaint is distinguishable from a divorce case (such as that in Firestone) because the public interest in the former is something more than mere curiosity. But is the public controversy threshold reached by insurance companies because the public is interested in them and because they are closely

regulated? If so, how are they to be distinguished from many other corporations subjected to state regulation? And if a meat seller in essence creates public controversy simply by advertising its products, how is such a business distinguishable from others who advertise?

Until the Supreme Court provides clearer directions, such inconsistency is inevitable, and journalists and libel plaintiffs must continue to guess whether any particular issue will be held to be a public controversy.

Voluntary Injection into Controversy?

Given the existence of a public controversy, what must a corporate plaintiff have done to have voluntarily injected itself into that controversy?

Again, the cases appear neither as consistent nor predictable as would be desirable. Although corporations must actually do something to inject themselves into controversies, and although what they do must be related to the subject of the alleged defamation, the threshold at which injection is found to occur varies considerably.

Being recognized in its field[65] or being open to the public is insufficient.[66] The corporation must actually do something. Advertising alone may or may not be enough,[67] but a significant public relations effort may well be.[68] Nor does a corporation's involvement in litigation necessarily amount to voluntary injection into a controversy.[69] The situation may be different, however, when the corporation has engaged in conduct that has led to the filing of a complaint by a government agency.[70] Finally, merely the offering of stock for sale to the public may be construed as injection into a controversy.[71]

Two seemingly extraneous factors may be playing a role in lower court determinations of corporate public figure status: how large and prominent the corporation is, and how sensitive the courts are to the value of reporting to consumers. For example, in Reliance Insurance Co. v. Barron's, the court's finding of public figure status appeared grounded in part on the fact that Reliance is a large corporation with billions of dollars in assets.[72] In American Benefit Life Insurance Co. v. McIntyre, the court noted that, "the insurance business has long been held to be clothed with the public interest, and the power and influence of such a business over society cannot be ignored."[73] And in Martin Marietta, the court noted that the corporation was the 20th largest U.S. defense contractor.[74]

In at least two cases, courts have approvingly noted the value of consumer-oriented reporting. "[T]he public interest is well served by encouraging the free press to investigate and comment on business and corporate affairs in the same manner as it would report on other public issues," said the court in Reliance Insurance.[75] And in Steaks Unlimited v. Deaner, the court observed that, "[c]onsumer reporting enables citizens to make better informed purchasing decisions. Regardless of whether particular statements made by consumer reporters are precisely accurate, it is necessary to insulate them from the vicissitudes of ordinary civil litigation in order to foster...First Amendment goals...."[76] In a third case, Trans World Accounts, Inc. v. Associated Press, the court noted the value of publicity for Federal Trade Commission complaints both to the public and as a weapon for FTC enforcement policy.[77]

The relationship is striking between courts' sensitivity to the value of consumer reporting, or to the significance of corporate size and prominence, and the threshold at which "injection" occurs. In effect, the more significance a court attaches to corporate size and prominence and/or to the value of consumer reporting, the less a corporation must do to voluntarily inject itself into a controversy. For example, in Reliance Insurance, where the court noted the corporation's size, it found the corporation to have injected itself into a public controversy merely by offering stock to the public.[78] But in Bruno & Stillman, Inc. v. Globe Newspaper, where the court found corporate prominence and success irrelevant, it found no injection.[79] Likewise, in Steaks Unlimited, where the court was sensitive to the value of consumer reporting, mere advertising of a sale was found to be "injection."[80] But in Vegod Corp. v. American Broadcasting Cos., where the court concluded that "criticism of commercial conduct does not deserve the special protection of the actual malice test," advertising was found not to be "injection."[81]

Courts that find irrelevant, or refuse to consider, corporate prominence and size or the value of consumer reporting may well be the more closely in line with the Supreme Court's position. Consideration of these factors may be more akin to the reasoning of Rosenbloom than to that of Gertz, and allow too broad a definition of public figures to suit the Supreme Court.

Attempt to Influence?

Relatively few corporate-plaintiff cases have directly reached the question of what may be defined as a plaintiff's attempt to influence

the outcome of a public controversy. This may well be because courts can often avoid reaching the question. It need not be asked if there was no public controversy to begin with, or if there was no voluntary injection into that controversy. But if there is a public controversy and there was voluntary injection into it, then there must also be an attempt to influence its outcome before public figure status is attained.

Once again, the corporation must actually do something, and apparently something beyond just being voluntarily involved in a controversy. Otherwise, voluntary involvement would inherently imply attempt to influence, and Gertz's seeming distinction between the two would be mere redundancy. Further, the attempt to influence must involve the issue over which the defamation arose.

A public relations campaign may well signify attempt to influence -- as long as it pertains to the issue in question.[82] Advertising alone does not necessarily signify attempt to influence,[83] nor does previous media publicity about a corporation.[84] Nor does evidence that a corporation has had considerable access to the media inherently demonstrate intent to influence.[85]

But in the "influence" question, too, there is confusion. Part of the problem is that, even when they find voluntary injection, courts don't always proceed clearly to the influence question. It remains implied.[86] A second problem is illustrated by Steaks Unlimited and American Benefit Life. In Steaks Unlimited, the court found that through its advertising blitz, the corporation "invited public attention, comment, and criticism."[87] In American Benefit Life, the court noted that the corporation was one that invited attention and comment.[88] But surely there is a distinction between corporations that invite attention and

comment and those that actually attempt to influence the outcome of public controversies. Whether a corporation has invited attention and comment may be relevant directly in a situation where a defendant is employing a common-law fair comment defense, but it is less directly relevant for sorting out limited purpose public figures under Gertz.

Courts that use the "inviting attention and comment" standard may in fact be reading Gertz backward. In Gertz, the Supreme Court said that because a plaintiff voluntarily injects himself into a public controversy to influence its outcome, he becomes a public figure who consequently invites attention and comment.[89] But one does not necessarily become a limited purpose public figure merely because one invites attention and comment.

Media Access Available?

The Supreme Court in Gertz did not seem explicitly to make plaintiffs' media access a crucial factor in the definition of public figures. But the court did emphasize the importance of self-help to the defamed and noted that public figures generally enjoy a degree of media access that makes self-help relatively easier for them.[90] Some lower courts, however, have treated the availability of media access as an important distinguishing characteristic of public figures.

The relevant measure of access is apparently not that available only for response once alleged defamation has occurred, but rather the extent of access a corporation has generally.[91] Further, although one court has apparently implied the contrary, it would not seem fair to define access exclusively in terms of a corporation's ability to purchase space or time.[92] But the access question, too, is clouded.

That is, if even voluminous media publicity for a corporation is not to be construed as the kind of effective access visualized by Gertz,[93] and neither is advertising or even an opportunity to reply to defamation, then what is?

Perhaps the most plausible explanation is that evidence of corporate access to the media is essentially icing on the cake. That is, if any doubt remains after the "public controversy," "voluntary injection," and "attempt to influence" questions are answered, evidence of media access confirms public figure status.

The Public/Private Status of Businessmen and Executives

An examination of 13 libel cases since Gertz in which businessmen and executives sued the media, and in which the plaintiff's public/private status was addressed, reveals that a slight majority -- 7 of 13 -- were held to be public figures.[94] These findings differ sharply from those regarding corporate plaintiffs, the vast majority of which were found to be private figures.[95] The reason for the difference is not immediately clear. To some degree, it may simply be that media attention is most likely to be directed at businessmen who have already become conspicuous and voluntarily newsworthy -- i.e., businessmen qua businessmen are more likely to voluntarily inject themselves into public controversies than corporations qua corporations. It may also be that only eight years have passed since Gertz, and even less time since Supreme Court libel cases subsequent to Gertz, and that over time the difference may disappear.

In any case, as with the corporate plaintiffs, there is a correlation between findings that businessmen are private figures and their success as plaintiffs. Four of the six cases in which they were found to be private figures resulted in decisions wholly or partially favorable to the plaintiff.[96] In every case where the businessman or executive was held to be a public figure, he lost. And again, the courts focused on whether a public controversy was involved, whether the plaintiff voluntarily injected himself into it in an effort to affect its outcome, and the access the plaintiff had to the media.

Public Controversy?

Again, whatever controversy exists cannot simply be manufactured by the media;[97] and it must be more than a vague general concern, but should involve a specific question the outcome of which affects the public in an appreciable way.[98] Thus, for purposes of a suit brought by a former consumer cooperative executive, public controversies existed over the commercial viability of cooperatives and over the wisdom of certain policies he was advocating.[99] But for purposes of a suit by a pet shop owner, public controversy apparently did not exist over conditions in his pet shop -- at least not until the allegedly defamatory complaints about those conditions were broadcast.[100] Public controversy can be created by a non-media third-party, such as when a person becomes the subject of major government investigations and criminal prosecutions.[101]

Unfortunately, however, the libel decisions involving businessmen and executives do little better -- and perhaps worse -- a job than the corporate-plaintiff cases in wrestling with the public controversy

question.[102] For example, in Rosanova v. Playboy Enterprises, Inc., a plaintiff who complained that he had been falsely called a mobster was held to be a public figure in part because he was socially acquainted with persons identified as organized crime figures and because of his "involvements related to the subject matter of the article."[103] But while this might arguably amount to voluntary injection into a controversy, the court never clearly defined what the essential "public controversy" was.[104] The result is confusion of two important parts of the Gertz public figure test. More often, however, courts have simply not addressed the "public controversy" question at all.[105]

Voluntary Injection into Controversy?

Just being an executive is not the equivalent of voluntary injection into controversy,[106] nor is merely making corporate policy.[107] That is logical since otherwise virtually every business executive would inherently become a limited purpose public figure. Replying to an allegedly defamatory story is not automatically "injection."[108] Having sought publicity in connection with one incident in the past is not the equivalent of injection into a present issue.[109] But regularly taking a strong stand on controversial issues is "injection,"[110] as is consciously and purposely setting out to advocate certain corporate policies, especially when they are of great interest to consumers.[111]

All of this seems consistent with Gertz and its progeny, but some cases have nevertheless muddied the injection question. For example, in Korbar v. Hite, a court found a credit union president to be a public figure in a libel suit over a union newspaper article critical of his

conduct.[112] But the court confused matters somewhat by finding it significant that the article was published in a union paper by a credit union member concerning a matter of general interest to membership.[113] This raises the slippery question of whether it should ever matter who makes a defamatory attack and in what context. In other words, could a businessman or executive be found to voluntarily inject himself into a controversy within his business world but not outside it? And if so, could he be a public figure for libel purposes within the business world, but not outside it -- for a publication serving a specialized audience within the executive's business world, but not for a publication reporting the dispute to a general audience?

In Rosanova v. Playboy Enterprises, Inc., a court found that the executive director of an inn and country club was a public figure for purposes of a libel suit against a magazine that had allegedly referred to him as a mobster. In so doing, the court noted that he had voluntarily maintained social contact with persons identified as organized crime figures[114] -- a seemingly liberal definition of voluntary injection. An appeals court agreed with this reasoning, but added that public figure status "does not depend upon the desires of an individual.... Comment upon people and activities of legitimate public concern often illuminates that which yearns for shadow."[115] Such reasoning appears to confuse voluntary and involuntary injection into controversy. Perhaps what we have here is a rare example of the Gertz involuntary public figure.[116] Or is the court confusing the Rosenbloom and Gertz standards?[117] In either case, the definition of "voluntary injection" is muddied.

Attempt to Influence?

As with the corporate plaintiff cases, courts have given short shrift to the question of whether businessmen and executives have actually attempted to influence the outcome of controversies into which they inject themselves. The cases that have addressed the question indicate that the plaintiff "either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution."[118] Thus, for example, the consumer cooperative executive in Waldbaum v. Fairchild Publications, Inc. was found to have tried to influence the outcome of controversy over such issues as open dating and unit pricing by his purposeful public advocacy of those practices.[119] And an outspoken newspaper publisher who as a concomitant of his very job took strong public stands on controversial issues would attempt to influence the outcome of those issues.[120] On the other hand, a pet shop owner accused of keeping animals under poor conditions was found not to have engaged public attention to influence the outcome of any controversy.[121]

Other decisions, however, confuse the issue by considering whether the plaintiff had invited attention and comment.[122] For example, in Rosanova, a court noted that the plaintiff had voluntarily engaged "in a course that was bound to invite attention and comment."[123] But the court did not clearly conclude that the plaintiff had attempted to influence the outcome of an issue. On the contrary, an appeals court hearing the same case noted that the plaintiff probably desired anything but publicity.[124] The same sort of confusion arose in Korbar, when a court noted that by being elected president of a credit union, the plaintiff had invited attention and comment on his official conduct and

policies.[125] But that hardly seems the same as an attempt to influence the outcome of a public controversy. To repeat a point made during the discussion of corporate plaintiffs, inviting attention and comment should result from, not amount to, attempt to influence.[126]

Media Access Available?

The courts appear to have treated businessmen's and executives' media access approximately the same as they have treated corporations' media access -- as "icing" that confirms the plaintiff's public or private status.[127] Consequently, a court noted in Waldbaum that the plaintiff "was somewhat familiar with press operations and had held press conferences to discuss [his firm's] policies and operations."[128] On the other hand, in Wilson v. Scripps-Howard Broadcasting Co., the court observed that, although the plaintiff had been given an opportunity to respond to the charges against him, he did not have regular, continuing media access.[129] Again, this is consistent with Gertz's suggestion that a plaintiff's media access is less an indicator of public or private status than it is a justification for giving public and private plaintiffs different degrees of protection.[130]

Implications

When the corporate plaintiffs and businessman/executive plaintiffs are lumped together, it is clear that well more than half were found to be private figures.[131] Such a finding suggests an enhanced opportunity for corporations and businessmen to protect their reputations and fight back legally against careless, inaccurate reporting. For the press, this finding may not bode well, since in most cases the private figure

plaintiff will not have to prove "actual malice." That, in turn, may make it more difficult for defendants to obtain early summary judgment.[132] But the situation is complicated by decisions that are difficult to reconcile and by the difficulty in predicting easily who is and who is not likely to be held a public figure.[133]

Nevertheless, at least some general suggestions can be made. Journalists must ask themselves whether defamatory statements they wish to report concern a public controversy. They should remember that the courts have defined public controversy quite narrowly and distinguished it from a topic that is merely of public concern. If the journalist believes there is a public controversy, he must ask himself who created it. If the journalist created it simply by choosing to write about it, the courts may well not consider it a public controversy. If the plaintiff or a third party previously created the controversy, it is more likely to be held a public controversy.

Journalists also must seriously consider whether a corporation or businessman/executive has voluntarily done anything to enter a public controversy. Simply offering an opportunity for the defamed to reply will not be taken as proof of voluntary injection, something journalists would be wise to remember. On the other hand, having given a corporation or businessman continuing access to express viewpoints would seem to be a plus, although it is hardly determinative of public figure status.

In essence, then, journalists should remember that it is difficult for the media, in and of themselves, to create a limited-purpose public figure out of a corporation or businessman -- particularly one who has done little more than conduct business as usual. And journalists should

not forget that the burden of proving public figure status is on the defendant, not the plaintiff.[134]

Of course, we do not wish to overstate the risk to the media. Corporations and businessmen who are held to be public figures must meet the demanding "actual malice" standard of New York Times v. Sullivan; those who are held to be private figures must still show some degree of fault by the media. And, as Franklin has found, most libel defendants ultimately win.[135] But the fact that courts are finding many corporations and businessmen to be private figures may encourage suits that otherwise would not have been filed. At the very least, this can be expensive and nerve-racking for the media; at worst, it can result in major damage awards and make the media reluctant to probe deeply and fearlessly into the business world. Yet, as Chief Justice Warren noted 16 years ago, "[i]ncreasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds."[136] It would be unfortunate indeed for both press and business if this movement in libel law discouraged reporting on a subject that so badly needs attention.

Summary

This paper has considered how and why courts have been deciding the public/private status of corporations and businessmen since Gertz. The majority of such plaintiffs have been found to be private figures, primarily because they were not involved in public controversies or

because they did not voluntarily inject themselves into such controversies. The implications of such results were considered, and concern was expressed that this trend may discourage reporting on business.

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FOOTNOTES

1. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The court allowed states to choose whether or not to make a legal distinction between public and private plaintiffs. Id. at 347. Not all states have followed the Supreme Court's suggestion that the distinction be made, although most have. See 1 Practising Law Institute, NINTH ANNUAL COMMUNICATIONS LAW INSTITUTE 75-79 (1981) (course handbook).

2. Rosanova v. Playboy Enterprises, Inc., 411 F.Supp. 440, 443 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

3. See p. 3 infra.

4. 418 U.S. 323 (1974).

5. Franklin, Winners and Losers and Why: A Study of Defamation Litigation, 1980 Am. B. Foundation Research J. 455, 482.

6. Id. at 483.

7. Franklin, Suing Media for Libel: A Litigation Study, 1981 Am. B. Foundation Research J. 795, 807.

8. See, e.g., Business and the Media, L.A. Times, Feb. 3-8, 1980 (series of articles). Interest in and criticism of media coverage of business has led to publication of texts about such reporting. See, e.g., L. KOHLMEIER, J. UDELL & L. ANDERSON, REPORTING ON BUSINESS AND THE ECONOMY (1981).

9. Professionals, such as physicians and attorneys, are excluded from this study. Only corporations, executives (persons in high management positions) and business owners are included.

10. 1 A. HANSON, LIBEL AND RELATED TORTS 202 (1969); PROSSER, TORTS §111, at 745 (4th ed. 1971). See also RESTATEMENT (SECOND) OF TORTS

§561 (1977). For other useful examinations of corporate libel, see Note, Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation, 75 Colum. L. Rev. 963 (1975); Note, Libel and the Corporate Plaintiff, 69 Colum. L. Rev. 1496 (1969); G. Stevens, Private Enterprise and Public Reputation: Defamation and the Corporate Plaintiff, 12 Am. Bus. L. J. 281 (1975); Comment, The First Amendment and the Basis of Liability in Actions for Corporate Libel and Product Disparagement, 27 Emory L.J. 755 (1978); and Note, In Search of the Corporate Private Figure: Defamation of the Corporation, 6 Hofstra L. Rev. 339 (1978).

11. PROSSER, supra note 10, at §111, at 745. For example, a corporation could not be defamed by words imputing unchastity.

12. 388 U.S. 130 (1967).

13. That standard came from New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

14. Stevens, supra note 10, at 284.

15. 403 U.S. 29 (1971).

16. Publication of a statement with reckless disregard of whether it is true or false, or publication with knowledge that it is false. See supra note 13.

17. 403 U.S. at 43-44.

18. 418 U.S. at 343.

19. 418 U.S. at 347.

20. Fourth Circuit Review, 38 Wash. & Lee L. Rev. 716, 717 and 723 (1981).

21. 417 F.Supp. 947, 955 (D.D.C. 1976).

22. Id. Instead, the court concluded, the Rosenbloom rule should be applied. Id. at 954.

23. 425 F.Supp. 814 (N.D. Cal. 1977).

24. Id. at 819.

25. Id.

26. See Reliance Insurance Co. v. Barron's, 442 F.Supp. 1341, 1347 (S.D.N.Y. 1977).

27. See pp. 7-20 infra and 1 Practicing Law Institute, supra note 1, at 102.

28. 1 A. Hanson, supra note 10, at 23.

29. PROSSER, supra note 10, at §111, at 745-46.

30. 418 U.S. at 344-45.

3.. Id. at 345.

32. Id.

33. Id. at 351.

34. Id. at 345. For an argument that this category of public figure is more or less dead, see Nichols, The Involuntary Public Figure Class of Gertz v. Robert Welch: Dead or Merely Dormant? 14 U. Mich. J. L. Ref. 71 (1980).

35. 418 U.S. at 345.

36. Id. at 352.

37. 424 U.S. 448 (1976).

38. Id. at 454.

39. Id.

40. Id. at n. 3.

41. 443 U.S. 111 (1979).

42. 443 U.S. 157 (1979).

43. 443 U.S. at 135.

44. Id.

45. Id.

46. Id. at 136.

47. Id.

48. 443 U.S. at 167-68.

49. One of the most useful lower court treatments of these questions in an attempt to develop practical guidelines can be found in Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1292-98 (D.C. Cir. 1980), cert. denied, 449 U.S. 898 (1980).

50. The corporation was held to be a private figure in 11 cases: Lake Havasu Estates, Inc. v. Reader's Digest Ass'n, 441 F.Supp. 489 (S.D.N.Y. 1977) (land sales company); El Meson Espanol v. NYM Corp., 389 F.Supp. 537 (S.D.N.Y. 1974), aff'd, 521 F.2d 737 (2d Cir. 1975) (bar and grill); Drotzmanns, Inc. v. McGraw-Hill, Inc., 500 F.2d 830 (8th Cir. 1974) (trucking firm); Thomas Maloney & Sons, Inc. v. E. W. Scripps Co., 334 N.E. 2d 494 (Ct. App. Ohio 1974), cert. denied, 423 U.S. 883 (1975) (wrecking contractor); AAFCO Heating & Air Conditioning Co. v. Northwest Publications, 321 N.E.2d 580 (Ct. App. Ind. 1974) (heating contractor); Julian Peagler v. Phoenix Newspapers, Inc., 560 P.2d 1216 (Sup. Ct. Ariz. 1977) (auto dealership); Arctic Co. v. Loudoun Times Mirror, 624 F.2d 518 (4th Cir. 1980), cert. denied, 449 U.S. 1102 (1981) (research firm); General Products v. Meredith, 7 Med.L.Rptr. 2257 (E.D. Va. 1981) (chimney manufacturer); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) (boat manufacturer); Vegod Corp. v. American Broadcasting Cos., 25 Cal.3d 763, 160 Cal.Rptr.

97 (Sup. Ct. Cal. 1979), cert. denied, 449 U.S. 886 (1980) (corporation handling close-out sales); and Rancho La Costa v. Super. Ct., 106 Cal. App. 3d 646, 165 Cal.Rptr. 347 (Ct. App. Cal. 1980), cert. denied, 101 S.Ct. 1336 (1981) (resort).

The corporation was held to be a public figure in six cases: Trans World Accounts, Inc. v. Associated Press, 425 F.Supp. 814 (N.D. Cal. 1977) (debt collection company); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F.Supp. 947 (D.D.C. 1976) (defense contractor); Reliance Ins. Co. v. Barron's, 442 F.Supp. 1341 (S.D.N.Y. 1977) (insurance underwriter); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980) (meat seller); American Benefit Life Ins. Co. v. McIntyre, 375 So.2d 239 (Sup. Ct. Ala. 1979) (insurance company); Velle Transcendental Research Assocs. v. Sanders, 518 F.Supp. 512 (C.D. Calif. 1981) (nonprofit religious corporation).

51. The corporation won a favorable ruling in seven of the 11 cases: Maloney, Peagler, Arctic Co., General Products, Bruno & Stillman, Vegod and Rancho La Costa. See note 50 supra.

52. Drotzmanns, Inc. v. McGraw-Hill, Inc., 500 F.2d 830 (8th Cir. 1974).

53. El Meson Espanol v. NYM Corp., 389 F.Supp. 357 (S.D.N.Y. 1974), aff'd, 521 F.2d 737 (2d Cir. 1975). The defendants prevailed under a state law principle that libel of a place -- in this case, a restaurant said to be a good place for drug transactions -- is not libel of its owner.

54. Lake Havasu Estates, Inc. v. Reader's Digest Ass'n, 441 F.Supp. 489 (S.D.N.Y. 1977). In a fourth case, a state appeals court decided to continue following Rosenbloom for all libel plaintiffs. AAFCO

Heating & Air Conditioning Co. v. Northwest Publications, 321 N.E.2d 580 (Ind. Ct. App. 1974).

55. See, e.g., Rancho La Costa v. Super. Ct., 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (Ct. App. 1980), cert. denied, 450 U.S. 902 (1981) (even voluminous publicity about plaintiff does not show that particular controversy existed); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) (no public controversy preceded publication of allegedly defamatory articles).

56. See, e.g., Trans World Accounts, Inc. v. Associated Press, 425 F.Supp. 814 (N.D. Cal. 1977) (issuance of FTC complaint created public controversy).

57. See cases cited in notes 58-61 infra.

58. 106 Cal.App.3d at 658, 165 Cal.Rptr. at 354.

59. 633 F.2d at 589-90 (1st Cir. 1980).

60. 25 Cal.3d at 769, 160 Cal.Rptr. at 101 (Sup. Ct. 1979), cert. denied, 449 U.S. 886 (1980).

61. 7 Med.L.Rptr. at 2261 (E.D. Va. 1981).

62. Steaks Unlimited, Inc. v. Deaner, 623 F.2d at 274 (3d Cir. 1980).

63. American Benefit Life Ins. Co. v. McIntyre, 375 So.2d at 250 (Ala. Sup. Ct. 1979); Reliance Ins. Co. v. Barron's, 442 F.Supp. at 1348 (S.D.N.Y. 1977).

64. Trans World Accounts, Inc. v. Associated Press, 425 F.Supp. at 820 (N.D. Cal. 1977).

65. Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d at 592.

66. El Meson Espanol v. NYM Corp., 389 F.Supp. at 359 (S.D.N.Y. 1974), aff'd, 521 F.2d 737 (2d Cir. 1975).

67. Vegod Corp. v. American Broadcasting Cos., 25 Cal. 3d at 770, 160 Cal.Rptr. at 101 (business advertising its wares does not necessarily become part of existing public controversy). But see Steaks Unlimited, Inc. v. Deaner, 623 F.2d at 274 (company invited public attention and criticism through $16,000 advertising blitz).

68. Velle Transcendental Research Associates v. Sanders, 518 F.Supp. at 516-17 (C.D. Cal. 1981) (group thrust itself into controversy by publishing its own newspaper, undertaking letter-writing campaign, requesting indictment of prosecutors and submitting documentary material to television station); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F.Supp. at 957 (D.D.C. 1976) (corporation regularly distributed news releases); General Products v. Meredith, 7 Med.L.Rptr. at 2261 (court notes that corporation had not engaged in any media blitz to influence public).

69. Thomas Maloney & Sons, Inc. v. E. W. Scripps Co., 43 Ohio App.2d 105, 334 N.E.2d 494 (1974), cert. denied, 423 U.S. 883 (1975) (wrecking company is private figure in libel suit over erroneous reporting about lawsuit filed against it for demolishing wrong building).

70. Trans World Accounts, Inc. v. Associated Press, 425 F.Supp. at 820 (issuance of proposed FTC complaint drew company into particular public controversy having its origin in company's own conduct and activities).

71. Reliance Ins. Co. v. Barron's, 442 F.Supp. at 1348.

72. Id.

73. 375 So.2d at 242.

74. 417 F.Supp. at 957. The court concluded that Martin Marietta was a public figure even under Gertz because it had injected itself into

the public controversy over entertainment of Pentagon officials to influence distribution of defense contracts by in fact entertaining military personnel and maintaining facilities for that purpose. Id. The corporation had been accused in a news story of having provided prostitutes to entertain Defense Department guests.

75. 442 F.Supp. at 1349.

76. 623 F.2d at 280.

77. 425 F.Supp. at 820. News stories had incorrectly stated that the corporation had been accused of two violations.

78. 442 F.Supp. at 1348.

79. 633 F.2d at 2064.

80. 623 F.2d at 274.

81. 25 Cal.3d at 770, 160 Cal.Rptr. at 101.

82. Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F.Supp. at 957; Velle Transcendental Research Associates v. Sanders, 518 F.Supp. at 516-17.

83. Vegod Corp. v. American Broadcasting Cos., 25 Cal.3d 763, 160 Cal.Rptr. 97.

84. Rancho La Costa v. Super. Ct., 106 Cal.App.3d at 663-64, 165 Cal.Rptr. at 358.

85. Rancho La Costa v. Super. Ct., 106 Cal.App.3d at 661, 165 Cal.Rptr. at 356.

86. See, e.g., Trans World Accounts, Inc. v. Associated Press, 425 F.Supp. at 820 (court finds that corporation was drawn into public controversy, doesn't explain how it attempted to influence outcome, but finds corporation to be public figure anyway).

87. 623 F.2d at 274.

88. 375 So.2d at 242.

89. 418 U.S. at 345.

90. Id. at 344.

91. See, e.g., American Benefit Life Ins. Co. v. McIntyre, 375 So.2d at 250-51; Reliance Ins. Co. v. Barron's, 442 F.Supp. at 1348; Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F.Supp. at 957. This conclusion also squares with Hutchinson v. Proxmire, 443 U.S. at 136.

92. Vegod Corp. v. American Broadcasting Cos., 25 Cal.3d at 769, 160 Cal.Rptr. at 101. Contra, Steaks Unlimited, Inc. v. Deaner, 623 F.2d at 274.

93. See, e.g., Rancho La Costa v. Super. Ct., 106 Cal.App. 3d at 661, 165 Cal.Rptr. at 357.

94. Held to be public figures were plaintiffs in: Greer v. Columbus Monthly, 7 Med.L.Rptr. 2094 (C.P. Ohio 1981) (restaurant owner); Korbar v. Hite, 357 N.E.2d 135 (Ct. App. Ill. 1976), cert. denied, 434 U.S. 837 (1977) (credit union president); Mobile Press Register, Inc. v. Faulkner, 372 So.2d 1282 (Sup. Ct. Ala. 1979) (prominent businessman, politician and community leader); Loeb v. Globe Newspaper Co., 489 F.Supp. 481 (D. Mass. 1980) and Loeb v. New Times Communications Corp., 497 F.Supp. 85 (S.D.N.Y. 1980) (controversial newspaper publisher); Rosanova v. Playboy Enterprises, Inc., 411 F.Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978) (executive director of inn and country club); and Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980), cert. denied, 449 U.S. 898 (1980) (former president of large consumer cooperative).

Held to be private figures were plaintiffs in: Martin v. Griffin Television, Inc., 549 P.2d 85 (Sup. Ct. Okla. 1976) (pet shop owner); Taskett v. King Broadcasting Co., 546 P.2d 81 (Sup. Ct. Wash. 1976) (advertising executive); Dixson v. Newsweek, Inc., 562 F.2d 626 (10th Cir. 1977) (former airline vice president); Grobe v. Three Village Herald, 420 N.Y.Supp.2d 3 (App. Div. 1979), aff'd, 428 N.Y.Supp.2d 676 (Ct. App. 1980) (shopping mall owner); Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371 (6th Cir. 1981), cert. granted, 50 U.S.L.W. 3351 (1981), dismissed, 50 U.S.L.W. 3505 (1982) (prominent cattle rancher); Lawler v. Gallagher President's Report, Inc., 394 F.Supp. 721 (S.D.N.Y. 1975) (former corporate vice president).

95. See p. 7 and note 50 supra.

96. See cases cited in note 94 supra. Decisions favorable to plaintiff resulted in Taskett, Dixson, Wilson, and Lawlor. The favorable rulings included affirmance of jury verdicts for plaintiffs, affirming lower court private figure decision and reversing lower court decision for defendant. In Martin v. Griffin Television, Inc., a court held the plaintiff a private figure but reversed a verdict for plaintiff and remanded for new trial because jury was not required to follow Gertz standards on fault and damages. In Grobe v. Three Village Herald, plaintiff was held to be private figure but was unable to prove fault.

97. See, e.g., Rosanova v. Playboy Enterprises, Inc., 411 F.Supp. at 445 (plaintiff's public figure status did not result merely from unfavorable publicity about him), and Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d at 374 (media story alleging that many of plaintiff's cattle died because he was too broke to feed them apparently did not create requisite public controversy).

98. Waldbaum v. Fairchild Publications, Inc., 627 F.2d at 1296-97.

99. Id. at 1299.

100. Martin v. Griffin Television, Inc., 549 P.2d 85 (Sup. Ct. Okla. 1976).

101. Rosanova v. Playboy Enterprises, Inc., 411 F.Supp. at 444-45.

102. A notable exception is Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980), which is an admirable attempt at defining the concept.

103. 411 F.Supp. at 444-45.

104. Compare Rosanova with Rancho La Costa v. Super. Ct., 106 Cal.App.3d 646, 165 Cal.Rptr. 347 (Ct. App. 1980), in which a court concluded that there is no public controversy over the desirability of organized crime since all responsible people oppose it.

105. See, e.g., Dixson v. Newsweek, Inc. 562 F.2d 626 (10th Cir. 1977) (affirming $45,000 award to former airline vice president); Taskett v. King Broadcasting Co., 546 P.2d 81 (Sup. Ct. Wash., 1976) (holding advertising executive to be private person and adopting negligence standard for private-person libel plaintiffs).

106. Lawler v. Gallagher President's Report, Inc., 394 F.Supp. at 731; Waldbaum v. Fairchild Publications, Inc., 627 F.2d at 1299. But see, Korbar v. Hite, 357 N.E.2d at 139.

107. Waldbaum v. Fairchild Publications, Inc., 627 F.2d at 1299.

108. Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d at 374; Waldbaum v. Fairchild Publications, Inc., 627 F.2d at 1298 n. 31.

109. Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d at 374.

110. Loeb v. Globe Newspaper Co., 489 F.Supp. at 485.

111. Waldbaum v. Fairchild Publications, Inc., 627 F.2d at 1299.

112. 357 N.E.2d 135.

113. Id. at 139.

114. 411 F.Supp. at 444-45.

115. Rosanova v. Playboy Enterprises, Inc., 580 F.2d at 861.

116. See Nichols, supra note 34. See also Trans World Accounts, Inc. v. Associated Press, 425 F.Supp. at 1349 (FTC complaint drew plaintiff into controversy).

117. See p. 3 supra.

118. Waldbaum v. Fairchild Publications, Inc., 627 F.2d at 1297.

119. Id. at 1300.

120. Loeb v. Globe Newspaper Co., 489 F.Supp. at 485.

121. Martin v. Griffin Television, Inc., 549 P.2d at 89.

122. See pp. 13-14 supra.

123. 411 F.Supp. at 445.

124. 580 F.2d at 861.

125. 357 N.E.2d at 139.

126. See p. 14 supra.

127. See p. 15 supra.

128. 627 F.2d at 1300.

129. 642 F.2d at 374.

130. See p. 14 and note 90 supra.

131. Seventeen of 30 -- 57 percent -- were found to be private figures.

132. See Note, Waldbaum v. Fairchild Publications, Inc.: Giving Objectivity to the Definition of Public Figures, 30 Cath. U. L. Rev. 307, 329 (1981).

133. Gertz's progeny -- Firestone, Wolston and Hutchinson -- apparently have not essentially changed the way lower courts have interpreted Gertz. Franklin, supra note 7 at 830-31. Nor does our own study indicate that those three cases have obviously affected public/private status determinations.

134. R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 209 (1980); and Note, supra note 132 at 325 n. 122.

135. Franklin, supra notes 5 and 7.

136. Curtis Publishing Co. v. Butts, 388 U.S. at 163 (Warren, C.J., concurring).

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